Filed 3/16/10 P. v. Nahouraii CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REUBEN JOEL NAHOURAII, Defendant and Appellant.	A122635 (San Mateo County Super. Ct. No. SC064438)

Appellant Rueben Joel Nahouraii, a member of a collective or cooperative that supplies medical marijuana to him and other patients qualified to use it under the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5) [1] (CUA), claims his possession and transportation of marijuana on behalf of the collective is protected by a limited immunity provided by section 11362.775, a provision of the Medical Marijuana Program Act of 2003 (§ 11362.7 et seq.) (MMPA). The People maintain his conduct is not protected by any such immunity and is criminal.

After appellant was charged with possession for sale and transportation of marijuana, held to answer by a magistrate, and his motion to set aside the information (Pen. Code, § 995) was denied, he waived jury trial and submitted the issue of guilt on the basis of the preliminary hearing transcript and stipulations. The trial court found appellant guilty as charged and thereafter suspended imposition of sentence and placed him on probation. We affirm.

[1] All statutory references are to the Health and Safety Code unless otherwise indicated.

FACTS

On November 27, 2006 at 9:30 p.m., while he was on duty at a sobriety checkpoint at Traeger and San Bruno Avenues in the City of San Bruno, San Bruno Police Officer James Haggarty made contact with appellant, who was the driver and sole occupant of a car. Noting the "intense" odor of marijuana, the officer asked if appellant had marijuana in his vehicle. Though appellant said he did not, a search of the vehicle resulted in the discovery of approximately 19 pounds of marijuana, as well as a box containing $7,200 in banded currency and a shopping bag containing $60,000 in banded currency. Appellant was found personally in possession of three cell phones and five pieces of paper with notations. A rental car contract found in the door panel indicated that the vehicle had been rented to a Jason Traina who listed an address in Sunnyvale. The car contained no marijuana paraphernalia or marijuana cigarettes. Officer Haggarty did not observe appellant to be under the influence of alcohol or drugs.

The prosecution views appellant as an ordinary drug dealer. At the preliminary hearing held on July 26, 2007, South San Francisco Police Corporal Michael Toscano, who qualified as an expert in the field of marijuana sales, testified that the seized marijuana had been processed and packaged, the papers bearing notations were pay/owe sheets that corresponded to the price of seven garbage can size baggies of marijuana, and that the amount of banded currency was consistent with the current $4,000-per-pound price of a kilogram of marijuana. Toscano testified that drug dealers use multiple cell phones, rental cars, and false identifications in order to evade surveillance or arrest for criminal acts. On cross-examination, Officer Toscano allowed that a person transporting medical marijuana lawfully under state law might also use such devices to avoid detection by federal law enforcement officers.

Appellant's physician, Dr. Hany Assad, has recommended that he use medical marijuana, and appellant obtains it from the Northridge Health Center, a medical marijuana dispensary in Southern California of which he is a member. Appellant's view of the relevant facts concerning his conduct is reflected in the following "hypothetical" defense counsel presented to Officer Toscano during cross-examination: "A dispensary

forms in Los Angeles [where it] operates openly. Local law enforcement knows that they are there. They send one of their members up here to Northern California because you can get better prices and better medicine here . . . and that person is worried about federal law enforcement. That person is worried about local law enforcement that may not like what they are doing or may attempt to prosecute them anyway even though they believe what they are doing is legal. That person takes steps to avoid detection because they just don't want any problems at all. [¶] . . . [¶] . . . The dispensary generally takes cannabis on consignment. So they [send someone] here to pay for previously supplied cannabis and to pick up new cannabis from several sources. [He is] given the information of how much they owe to each person and their job is to go and pay that money to those people and go to other places wherever and pick up cannabis for the dispensary."

Defense counsel claimed that if the proffered facts were accepted as true, appellant would be entitled to immunity from prosecution for the charged offenses under section 11362.775, a provision of the MMPA providing that, "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions" for specified offenses, including the two charged in this case.

In response to the district attorney's objection that it had not laid any foundation for the foregoing hypothetical, the defense offered the testimony of Evan Cohen, director of the Northridge Healing Center, who was present in the courtroom. Aware that Cohen's testimony might be self-incriminatory, the magistrate admonished him as to his Fifth Amendment rights, advised him to consult independent legal counsel and, with the consent of the parties, continued the hearing date to August 16 to enable Cohen time to consult with the dispensary's counsel. After Cohen failed to appear on that date, the magistrate indicated he was prepared to dispense with his testimony and decide the issue of probable cause. Defense counsel then proffered an offer of proof "of what we would expect [Cohen's] testimony to show." The district attorney asked the magistrate to accept

the offer and rule on the legal issue appellant presented, and the magistrate indicated he would accept the proffered offer of proof.

Defense counsel represented that Cohen would testify that he "was the director of a medical cannabis dispensary in Southern California, which was a basically a collective or cooperative group of patients working together. He would testify Mr. Nahouraii was a member of this organization and that the cannabis and currency he was found in possession of belonged to the collective patients, that Mr. Nahouraii was going around and bringing money to those who had provided the medicine to the collective previously, because the way it is done is essentially on a consignment basis and picking up more medicine for the collective. . . . [¶] [Cohen] would also explain some of the other items found on Mr. Nahouraii, specifically the paper notations with the numbers and letters on it, that he would explain that those were related to amounts that were owed to particular growers who provided the medicine to the dispensary. And also he would explain the reason why the letters rather than names [were used] is because [of] the disparity in law with the federal government and state government. They try to protect the growers. They actually don't know the growers names. They use [a] code system so that the medicine will be available for the patients. Essentially we believe that [Cohen's] testimony would place [appellant's] conduct, render it lawful under [statutes relating to the possession, transportation, and use of medical marijuana]." Defense counsel took the position that under the facts he offered to prove, appellant was entitled to a limited immunity from prosecution for the charged offenses under section 11362.775.

The magistrate accepted appellant's entire offer of proof, assuming "that if Mr. Cohen were called to testify that he would testify as you have indicated, and I am going to say that [the] People would not undercut that at all in their cross-examination. And so I will consider that as part of the evidence that's before me in this preliminary hearing."

Mindful that 19 pounds of marijuana was found in appellant's car, and a qualified patient or his or her primary caregiver may possess "no more than eight ounces of dried

marijuana per qualified patient" (§ 11362.77, subd. (a)),[2] the defense additionally offered to prove that more than 38 persons were members of appellant's collective.

After taking the matter under submission, the magistrate declined to address the legal issue presented, concluding that whether appellant had the benefit of a limited immunity was a "triable issue of law for the trial judge outside the presence of the jury." The court also expressed uncertainty as to "whether there is an unconstitutional result in the application of the medical marijuana laws here that would warrant a dismissal of the charges." For the foregoing reasons, the magistrate concluded that the legal issues presented "are really not readily resolvable on a preliminary hearing and . . . should go to trial and be tried on a full record with full briefing and so forth."

On December 17, 2007, appellant moved to set aside the information under Penal Code section 995, on the grounds that (1) the magistrate impermissibly declined to define the legal standard pursuant to which appellant could be held to answer, (2) the prosecution failed to present evidence establishing all elements of the charged offenses, and (3) "given the ambiguity and unsettled nature of the medical cannabis laws, the prosecution of Mr. Nahouraii is a violation of the Due Process Fair Notice Requirement and the continued prosecution of him is unconstitutional."

Conceding that the magistrate erred in refusing to decide whether appellant was entitled to the claimed immunity, the district attorney argued that the error was harmless. The People maintained that section 11362.775, the statute appellant relied upon, did not protect him as a distributor and transporter of marijuana and, in any case, "[t]here was countervailing, compelling evidence that [appellant's] possession and transportation of marijuana was criminal, i.e., that [appellant] operated for profit, not for the personal medical use of 'qualified patients.' "

Agreeing that the magistrate erred in refusing to decide the issue of immunity and leaving it for the trial court, the court nevertheless denied appellant's motion to set aside

[2] As explained *post*, at page 12, footnote 7, section 11362.77 was recently declared unconstitutional " insofar as it burdens a defense, provided by the CUA, to charges of possessing or cultivating marijuana." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1024.)

the information on January 3, 2008.[3] With respect to the central question of immunity, the court concluded that there is "no authority that provides immunity to a collective member for transporting marijuana that is to be used by other collective members for whom he is not their primary caregiver, even if it is to be used for medical purposes." Finding appellant could not establish entitlement to the immunity he claimed, the trial court found probable cause to believe he committed the charged offenses. He also ruled that appellant's proposed instruction on mistake of law—i.e., that "an act committed by reason of a mistake of law which disproves a specific criminal intent, where such an intent is a required element, is not a crime"—would not be given because transporting marijuana is a general intent crime. The court also found appellant "was not deprived of a substantial right to present an affirmative defense [because] he waived that right by failing to produce a witness [i.e., Evan Cohen] on the date set for the witness' testimony." Additionally, the court found "there was circumstantial evidence supporting the defendant's consciousness of guilt and his knowledge that the marijuana was a controlled substance" and also that "there was no ambiguity in the law regarding medical marijuana" and therefore no absence of notice.

After the trial court concluded that appellant's offer of proof "did not support a reasonable likelihood that [he] would be able to establish an affirmative defense" and denied all of his proposed jury instructions, appellant elected to proceed on a "slow plea"; that is, the case would be submitted to the court based on the preliminary hearing transcript augmented by appellant's offer of proof at the preliminary hearing, and augmentation thereof at the hearing on the motion to dismiss, and the court would then most likely find appellant guilty of the charges. Appellant, who was duly admonished as to all of the constitutional rights he was waiving, stated that he understood the consequences of his waiver, that he understood he would likely be found guilty and receive a probationary sentence with jail time, and that jail would be stayed pending appeal.

[3] The court also denied appellant's Penal Code section 1538.5 motion to suppress the evidence seized from appellant's car, an issue we need not address.

On August 28, 2008, appellant was found guilty of unlawfully possessing for sale and transporting marijuana (§§ 11359, 11360). Pursuant to Penal Code section 654, sentence on the possession for sale charge was stayed, appellant was placed on probation for three years, ordered to serve one year in county jail, and given credit for two days served. Execution of sentence was stayed pending appeal. Standard conditions of probation and restitution fines were also imposed. Timely notice of appeal was filed the same day.

DISCUSSION

I.

In reviewing a motion to set aside an information pursuant to Penal Code section 995, the appellate court disregards the superior court's ruling and directly examines the ruling of the magistrate holding the defendant to answer. (*People v. Jones* (1998) 17 Cal.4th 279, 301; *People v. Laiwa* (1983) 34 Cal.3d 711, 718; *People v. Superior Court* (*Lujan*) (1999) 73 Cal.App.4th 1123, 1127.) Ordinarily, " 'there need be only "some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it" [citation], and an information will not be set aside or a prosecution prohibited thereon if this standard is met.' " (*People v. Superior Court* (*Shamis*) (1997) 58 Cal.App.4th 833, 842, quoting *People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 20.) Thus, "an indictment or information should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged." (*People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217, 1226.) All legitimate inferences favorable to the information that can be drawn from the evidence should be indulged. (*People v. Superior Court* (*Lujan*), at p. 1127.)

However, as appellant correctly points out, we are not here dealing with a typical preliminary hearing. Uncommonly, appellant essentially concedes that unless the limited immunity provided by section 11362.775 applies to him, he can be prosecuted for unlawfully possessing for sale and transporting marijuana. As the magistrate stated, "the facts are pretty much not disputed here. It is really an issue of law." However, the magistrate refused to decide the legal question. The magistrate's view that the legal

issues "ought to be [resolved] on a full record and not determined under the preliminary hearing standard as part of the preliminary hearing" is clearly erroneous.

People v. Mower (2002) 28 Cal.4th 457 is directly on point. The Supreme Court held in *Mower* that (like the MMPA) the CUA does not confer complete immunity from arrest and prosecution, but rather confers a limited immunity entitling the defendant to bring a motion to set aside the information prior to trial. (*Id*. at p. 473.) To prevail on such a motion under Penal Code section 995, "a defendant must show that, in light of the evidence presented to the grand jury or the magistrate, he or she was indicted or committed 'without reasonable or probable cause' to believe that he or she was guilty of possession or cultivation of marijuana in view of his or her status as a qualified patient or primary caregiver. [Citation.] . . . Of course, in the absence of reasonable or probable cause to believe that a defendant is guilty of possession or cultivation of marijuana, in view of his or her status as a qualified patient or primary caregiver, the grand jury or the magistrate should not indict or commit the defendant in the first place, but instead should bring the prosecution to an end at that point." (*Ibid*.)[4]

The chief legal issue presented in this case is whether the limited immunity available under section 11362.775 is available to appellant on the basis of the facts placed before the magistrate.

II.

The CUA (§ 11362.5), which was approved by the voters at the November 5, 1996 election as Proposition 215, was designed to ensure that Californians who obtain and use marijuana for specified medical purposes upon the recommendation of a physician are not subject to criminal sanctions. (§ 11362.5, subd. (b)(1)(B).) However, ambiguities in

[4] When defense counsel cited *Mower* for the proposition that a claimed immunity against prosecution should be determined at the earliest possible time, which is at the preliminary hearing, the magistrate responded: "That doesn't sound right. Even in a criminal case the defendant has the burden of proof on affirmative defenses that the defendant raises." Putting aside the magistrate's apparent failure to differentiate a limited immunity from an affirmative defense, there is no justification for the proposition that a magistrate can ignore an affirmative defense asserted by a defendant at the preliminary hearing stage. (See, e.g., *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 879-880.)

Proposition 215—including doubt as to whether it created an implied defense to the offense of transporting marijuana (compare *People v. Trippet* (1997) 56 Cal.App.4th 1532 (*Trippet*) and *People v. Young* (2001) 92 Cal.App.4th 229)—led to introduction of the MMPA (§ 11362.7 et seq.) in the 2003 legislative session in the form of Senate Bill No. 420.

"In uncodified portions of the bill the Legislature declared that, among its purposes in enacting the statute, was to '[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.' (Stats. 2003, ch. 875, § 1.) Additionally, the Legislature declared that a further purpose of the legislation was to 'address additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act.' (*Id*., § 1.)" (*People v. Wright* (2006) 40 Cal.4th 81, 93.) The new law also extended certain protections to individuals who elected to participate in the identification card program provided for in the MMPA, including immunity from prosecution for a number of marijuana-related offenses that had not been specified in the CUA, among them transporting marijuana.

Section 11362.765 provides immunity from prosecution for the same offenses as section 11362.775, but upon a different basis. Although appellant does not rely on section 11362.765, it is nevertheless necessary to describe it because the People claim that some of its requirements are equally applicable to defendants seeking the benefit of the immunity available under section 11362.775.

Section 11362.765, subdivisions (a) and (b) provide: "(a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5 or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or

distribute marijuana for profit. [¶] (b) subdivision (a) shall apply to all of the following: [¶] (1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use. [¶] (2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver. [¶] (3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

Subdivision (c) of section 11362.765 provides: "A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360."

As has been noted, the foregoing and other provisions of the MMPA represent "a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.)[5]

[5] It is also noteworthy that the MMPA defines the term "primary caregiver" more expansively than that term is defined in the CUA. The MMPA definition of "primary caregiver" starts with the definition provided in the CUA (§ 11362.5, subd. (e)): "the individual, designated by [a qualified patient] . . . who has consistently assumed responsibility for the housing, health, or safety of that patient or person . . . . " (§ 11362.7, subd. (d); see also *People v. Mentch* (2008) 45 Cal.4th 274, 284.) However, expanding upon the CUA definition, the MMPA definition goes on to provide three examples of persons who would qualify as a primary caregiver, including the owner or operator of various types of out-patient clinics, health care facilities and hospices; an

Appellant does not claim immunity under section 11362.765, presumably because he is not an individual defined by subdivisions (b)(1),(2), or (3) of that statute. Because he was not at the time of his arrest transporting or processing marijuana merely "for his or her own personal use," his conduct is not protected by subdivision (b)(1) of section 11362.765. Nor is he protected by subdivision (b)(2), because he has not been designated a primary caregiver by qualified patients. Subdivision (b)(3) is also inapplicable because appellant was not at the time of arrest assisting a qualified patient or person with an identification card, or the primary caregiver of such a person, "in administering medical marijuana or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

The People claim that two requirements of section 11362.765 apply to defendants who, like appellant, seek immunity from prosecution under section 11362.775. The first is the provision of subdivision (a), that nothing in this section shall "authorize any individual or group to cultivate or distribute marijuana *for profit*." (Italics added.)[6] The second is the provision in subdivision (b)(2) of section 11362.765, that a designated primary caregiver who transports marijuana for medical purposes for the use of qualified

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individual designated a primary caregiver by more than one qualified patient, all of whom live in the same city or county as the primary caregiver; and an individual designated by a single qualified patient who resides in a city or county different from that of the primary caregiver. One of the more expansive MMPA definitions of a protected primary caregiver is one "who transports, processes, administers, delivers or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver." (§ 11362.765, subd. (b)(2).)

[6] At the preliminary hearing, the district attorney took the position that the "concept" of section 11362.775 "is that there be a collective, you know, people donate their services. People join together to buy water to water the marijuana garden, that somebody provides electricity if lighting is required, that people donate money for gas if that is necessary for a truck or to buy fertilizer . . . . [T]hat whole concept is a not for profit concept like the neighborhood gets together and has a community garden. That is what the Legislature is talking about. This concept that Mr. Nahouraii can be a wholesale distributor for profit is nowhere in the Code."

patients or persons with identification cards may do so only "in amounts not exceeding those established in subdivision (a) of Section 11362.77," i.e. "no more than eight ounces of dried marijuana per qualified patient."[7] The district attorney pointed out that appellant's offer of proof and the acceptance thereof by the magistrate failed to establish either that the Northridge Health Center is a nonprofit organization or that appellant provided members of his collective no more than eight ounces of dried marijuana per qualified patient. The district attorney also argued that appellant's representation that the Northridge Health Center has more that 38 members does not establish that the 19 pounds of marijuana found in appellant's car was transported for the benefit of at least 38 qualified patients, so that appellant has not satisfactorily established that his conduct conformed to the limit established by section 11362.77. The foregoing issues seem to us to pale in comparison to a much more fundamental problem.

As earlier pointed out, unlike the magistrate, the trial court expressly found that "there is . . . no authority that provides immunity to a collective member for transporting marijuana that is to be used by other collective members for whom he is not their primary caregiver, even if it is to be used for medical purposes." The court reached this conclusion primarily on the ground that section 11362.775 only protects persons who

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[7] In *People v. Kelly*, *supra*, 47 Cal.4th 1008, 1043, which was decided after the close of briefing in this appeal, our Supreme Court concluded that section 11362.77's quantity limitations conflict with and restrict the CUA's guarantee that a qualified patient or primary caregiver may possess and cultivate any amount of marijuana reasonably necessary for the patient's current medical condition and, in that respect, the statute impermissibly amended the CUA in violation of article II, section 10, of the California Constitution. The court held, "[w]hether or not a person entitled to register under the [MMPA] elects to do so, that individual, so long as he or she meets the definition of a patient or primary caregiver under the CUA, retains all the rights afforded by the CUA. Thus, such a person may assert, as a defense in court, that he or she possessed or cultivated an amount of marijuana reasonably related to meet his or her current medical needs (see *Trippet*, *supra*, 56 Cal.App.4th 1532, 1549), without reference to the specific quantitative limitations specified by the [MMPA]." (*People v. Kelly*, at p. 1049.) The court declined, however, to sever section 11362.77 from the MMPA, holding that it "continues to have legal significance, and can operate as part of the [MMPA], even if it cannot constitutionally restrict a CUA defense." (*Id*. at p. 1048.)

associate in order to collectively or cooperatively cultivate marijuana for medical purposes, and there is no evidence the Northridge Health Center or its members do so. Section 11362.775 is not helpful to appellant, the court explained, "because it only protects collectives who [*sic*] *cultivate* marijuana; transportation is protected for *cultivators*. The statute does not provide global immunity for transportation for collective[s] . . . absent a showing that . . . they are *cultivators*." (Italics added.)[8]

Appellant acknowledges that the statute provides no immunity for persons who collectively or cooperatively *purchase or otherwise acquire* marijuana for medical purposes. Nevertheless, he argues that "members of medical marijuana collectives need not be cultivators or exclusively cultivate marijuana in order to qualify for limited immunity under the MMPA." Emphasizing that the stated purpose of the MMPA is to enhance access to medical marijuana and broaden protection for those who use or assist in its use in conformity with the law, appellant contends section 11362.775 should be expansively interpreted as authorizing the "collective or cooperative acquisition, obtaining or pooling of medical cannabis [by patients and caregivers]."

According to appellant, "cultivation necessarily implies obtaining the marijuana from a black market source at some point since, in order to cultivate marijuana plants, one must start with seeds or baby plants, [and, pursuant to section 11018,] viable seeds and baby plants are every bit as much marijuana as are processed buds." Moreover, appellant argues, "the failure to expressly exempt the collective acquisition of medical cannabis from criminal sanction is likely attributable to the fact that the act of buying marijuana is not unlawful, rather it is the subsequent acts of possessing or transporting

[8] The court additionally relied upon the fact that, as the district attorney argued, appellant failed to show that he complied with section 11362.77. As the court stated, "[appellant] was transporting 19 pounds. There was no offer of proof that he was a primary caregiver for 38 qualified patients. Instead, the proffer included the fact that there—there were more than 38 members of the collective. And . . . I find that insufficient to establish an affirmative defense." (The court did not indicate its acceptance of the district attorney's assertion that appellant also failed to show that the Northridge Health Center was not operated for profit, as also required by section 11362.765.)

that marijuana that may be subject to criminal prosecution. As such, it makes sense that the [L]egislature would not specifically exempt an action which is not unlawful to begin with from criminal sanction. The failure to explicitly authorize the collective or cooperative acquisition or pooling of medical cannabis by groups of qualified patients and caregivers in section 11362.775 should not be interpreted as an indication that patients and caregivers are precluded from obtaining their medicine in this manner especially in light of necessary implications and the [L]egislature's intent in enacting the statutory scheme set forth in the MMPA."

Appellant points out that many qualified patients and primary caregivers are unable to grow their own marijuana, even with the assistance of others, either because they lack the ability or the space to cultivate marijuana plants. Also, while "the black market" may be an option for some qualified patients and primary caregivers, obtaining marijuana on the street is prohibitively expensive, risky, or inconvenient for many. Finally, appellant maintains that the magistrate's restrictive reading of section 11362.775 has absurd results. Positing that it is "permissible under the MMPA [i.e., § 11362.765] for a group of patients or caregivers to get into a car and travel together to purchase their medical cannabis, and transport it home," appellant argues that if section 11362.775 "is interpreted as not allowing the collective acquisition of marijuana by one patient for others, then the difference between legal and illegal conduct would turn on whether the group traveled together to obtain or purchase the medical cannabis or sent just one member. Clearly this would be an absurd result the [L]egislature could not have intended."[9]

In *Trippet , supra,* 56 Cal.App.4th 1532, which was decided the year after the CUA was enacted, we found an implied immunity analogous in some respects to that urged upon us by appellant here. The defendant in *Trippet* was convicted of transporting marijuana and possession of more than 28.5 grams. Because the CUA does not exempt

[9] The Attorney General does not respond to appellant's lengthy argument that if section 11362.775 is not broadly construed it will obstruct the declared purpose of the MMPA.

the transportation of marijuana used for medicinal purposes from prosecution under section 11360, and the MMPA, which does provide such an immunity, had not yet been enacted, we concluded that the CUA provided an implied defense to a charge under section 11360. As we stated, "practical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges. The results might otherwise be absurd. For example, the voters could not have intended that a dying cancer patient's 'primary caregiver' could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to a patient's room. Our holding does not, therefore, mean that *all* transportation of marijuana is without any defense under the new law. . . . The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not." (*Id.* at pp.1550-1551.) We remanded the case so that the defendant could attempt to prove that he met the test.[10]

The problem we wrestled with in *Trippet* was eliminated by enactment of the MMPA. Moreover, the problem appellant finds in the MMPA is not as great as the one we confronted in *Trippet*. The CUA and MMPA now allow qualified patients, cardholders, or their designated primary caregivers, to obtain, possess, cultivate and

[10] Our analysis in *Trippet* was considered but not followed in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1393-1395, *People v. Rigo* (1999) 69 Cal.App.4th 409, 415, and *People v. Young*, *supra*, 92 Cal.App.4th 229, 235-237, in which the courts all found that despite enactment of the CUA "[t]he acts of selling, giving away, transporting, and growing large quantities of marijuana remain criminal." (*People v. Rigo*, at p.415.) As emphasized in *Young*, the CUA "on its face exempts only possession and cultivation from criminal sanctions for qualifying patients. [Citation.] It does not exempt transportation as defined in section 11360. ' "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." ' [Citations.]" (*People v. Young*, at p. 237.) On the other hand, the Supreme Court's recent reliance on *Trippet* in *People v. Kelly*, *supra*, 47 Cal.4th 1008 indicates its approval of our reasoning in that case.

transport medical marijuana. All it prevents them from doing is obtaining and transporting marijuana "collectively or cooperatively" through the agency of a single person. Appellant's interpretation of section 11362.775 would provide a limited immunity from prosecution for almost any medical marijuana related activity engaged in by an individual for the benefit of qualified patients, cardholders and their designated caregivers. The Legislature may well have feared that such a broad immunity would facilitate access to marijuana not just by persons qualified to use it for medical purposes but by others whose use of marijuana remains criminal. So while it is true, as appellant argues, that the overall purpose of the MMPA is to "broaden the scope of the CUA in order to facilitate greater access to medical marijuana for those patients in need of the drug" (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 373), the facilitation of access he asks us to allow would expand the scope of the MMPA beyond that necessary to the statutory scheme and in a manner the Legislature cannot confidently be thought to have had in mind.

It also bears emphasizing that the magistrate's acceptance of appellant's offer of proof provides no basis upon which to conclude that appellant is entitled to the limited immunity provided by section 11362.775. The inadequacy of appellant's evidence is illustrated by *People v. Urziceanu, supra,* 132 Cal.App.4th 747. The court in that case reversed a trial court ruling denying the defendant immunity from prosecution under section 11362.775, because the "defendant produced substantial evidence that suggests he would fall within the purview of section 11362.775." (*Id*. at p. 786.) As the court explained, the defendant in *Urziceanu* did not merely present evidence he and his codefendant were qualified patients; he additionally provided extensive evidence of the policies and procedures of FloraCare, the medical cannabis club he created, and explained its cooperative operation. FloraCare members were required to sign an agreement/consent form, an "affidavit of truth," and a memorandum of understanding warranting, among many other things, under penalty of perjury, that they had been diagnosed with a serious illness for which cannabis provides relief and had received a recommendation or approval from a physician to use cannabis. (*Id*. at pp. 760, 764.)

FloraCare also followed up each membership application with an individualized inquiry to verify the physician recommendation. Furthermore, the defendant "testified that the plants were being collectively grown for the members of FloraCare." (*Id*. at p. 764.) For example, members assisted with pruning and growing the marijuana, delivering it to patients, and carrying out the processing of new members; and members who assisted with the intake of new members were often reimbursed for this work, sometimes in the form of gas money or marijuana. (*Ibid*. See also *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 731, which involved "a seven-member collective of medical marijuana patients who agreed to contribute comparable amounts of money, property, and labor to the collective cultivation of marijuana" and who "each then would receive an approximately equal share of the marijuana produced.") Appellant, whose offer of proof before the magistrate was essentially conclusionary, did not show that the Northridge Health Center made any particular effort to ensure compliance with the CUA and MMPA, or that it or its patient members collectively or cooperatively cultivated marijuana for medical purposes.

It is true that the trial court allowed appellant to add to the offer of proof made at the preliminary hearing that Evan Cohen, director of the Northridge Health Center, would testify "that some of the members, some of the patient members of that dispensary did cultivate cannabis for the dispensary." However, even if accepted as to its truth (rather than as merely what Cohen would say if called to testify, which is the basis upon which the district attorney "accepted" the offer) this belated offer does not establish that, like the dispensary involved in *People v. Urziceanu* and the collective involved in *County of Butte v. Superior Court*, the members of the Northridge Health Center cultivate marijuana *collectively or cooperatively* for their medicinal use.[11]

[11] Although it is not a basis of our judgment, appellant also failed to establish in the record that the Northridge Health Center was not operated for profit. Appellant argues he need not make that showing because the not-for-profit requirement is imposed by section 11362.765, subdivision (a) ["nothing in this section shall . . . authorize any individual or group to cultivate or distribute marijuana for profit"], which provides an

For the foregoing reasons, the trial did not err in concluding that appellant is ineligible for the limited immunity available under section 11362.775.

III.

Appellant argues that Corporal Toscano was not qualified to testify as an expert because "he was not knowledgeable or qualified as an expert on distinguishing lawful medical possession from unlawful possession" and, as a result, "there was not competent evidence presented that the marijuana was unlawfully possessed."

Appellant's reliance on *People v. Chakos* (2007) 158 Cal.App.4th 357 is misplaced because the case is inapposite. In *Chakos*, the testifying officer's expertise was "in cases where defendants *by definition* 'are engaged in unlawful conduct.' " (*Id*. at pp. 367-368.) The record failed to show that the officer was "any more familiar than the average layperson or the members of this court with the *patterns of lawful possession for medicinal use* that would allow him to differentiate them from unlawful possession for sale." (*Id*. at pp. 368-369.) What makes *Chakos* inapposite is appellant's virtual concession that—if the immunity he claimed under the MMPA was inapplicable—he had no defense. Moreover, Corporal Toscano did not testify as an expert on the application of the marijuana law, or opine that appellant's possession of the marijuana found in his car failed to conform to the mandates of the CUA or the MMPA. The essence of his testimony was that the amount of marijuana found in appellant's car and other circumstances, such as the pay/owe sheets and cryptic notations, and use of multiple cell phones, was consistent with the unlawful possession for sale and transportation of marijuana. Unquestionably, Officer Toscano's training and experience qualified him to testify as an expert on such matters.

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immunity he does not claim, and section 11362.775, which he does rely upon, imposes no such requirement. We are unimpressed with that argument.

First of all, the requirement of section 11362.775, that the protected cultivation of marijuana must be done "collectively or cooperatively," strongly implies a not-for-profit enterprise. Furthermore, it would be absurd to impose a not-for-profit requirement on a defendant claiming immunity from prosecution under section 11362.765, but not impose such a requirement on a defendant seeking (sometimes the same) immunity under section 11362.775.

IV.

Finally, appellant contends that the trial court erred in rejecting his proposed jury instructions regarding fair notice[12] and mistake of law.[13]

The text of section 11362.775 makes it clear that the immunity it affords is available only to "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, *who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes*." (Italics added.) This unambiguous language is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application (*Connally v. General Construction Co*. (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115-1116), and we believe it provided appellant the fair notice due process requires.

Moreover, the clarity of the statute is such that appellant's mistake in assertedly believing he was acting lawfully (and lacked the specific intent necessary to commission of the offense of unlawfully possessing marijuana for sale, in violation of section 11359) is so wholly unreasonable that it cannot be deemed a good faith belief. The unreasonableness of appellant's asserted belief is also shown by the numerous factual differences between this case and *People v. Urziceanu, supra,* 132 Cal.App.4th 747, which appellant relies upon as the basis of his mistaken belief. The trial court therefore

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[12] Appellant's proposed jury instruction No. 3 stated in pertinent part: "Due Process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requirements of the law. If you find that the relevant law, as it existed at the time the offense was committed, is highly debatable, the defendant—actually or imputedly—lacks the requisite intent to violate it, and you must find him not guilty."

[13] Appellant's proposed jury instruction No. 4 stated in material part as follows: "Evidence has been presented that the defendant believed his actions to be lawful. If you find that the defendant actually believed his intended distribution of the marijuana to be lawful, and that such a belief was in good faith and reasonable under the circumstances known to the defendant at the time of the alleged offense, you must find the defendant not guilty of violating Health and Safety Code § 11359, possession of marijuana for sale."

did not err in refusing to allow appellant to present evidence in support of the defense theory of mistake of law regarding section 11359.

Finally, by later waiving his right to jury trial and proceeding instead by way of a court trial, appellant abandoned his prior request for instructions on fair notice and mistake of law. The propriety of either of the requested instructions is an arguably moot issue.

V.

Irregularities in the preliminary examination procedures, which are not jurisdictional in the fundamental sense, are reviewed under the standard of prejudicial error. Reversal is required "only if [the] defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) As we have explained, appellant has made no such showing and his motion to set the information aside was properly denied.

Accordingly, the judgment is affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.